

THE HONORABLE JAMES L. ROBART

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

MICROSOFT CORPORATION,

Plaintiff,

vs.

MOTOROLA, INC., et al.,

Defendants.

MOTOROLA MOBILITY, INC., et al.,

Plaintiffs,

vs.

MICROSOFT CORPORATION,

Defendants.

Case No. C10-1823-JLR

MICROSOFT'S COMBINED
RESPONSE TO:

(A) MOTOROLA'S MOTION TO FILE
DOCUMENTS UNDER SEAL IN
SUPPORT OF ITS OPPOSITION TO
MICROSOFT'S MOTION FOR
SUMMARY JUDGMENT OF BREACH
OF CONTRACT (ECF NO. 271); AND

(B) MOTOROLA'S MOTION TO FILE
DOCUMENTS UNDER SEAL IN
SUPPORT OF ITS REPLY IN
SUPPORT OF ITS MOTION FOR
PARTIAL SUMMARY JUDGMENT
(ECF NO. 287)

**NOTED FOR:
Friday, May 4, 2012**

I. INTRODUCTION

Plaintiff Microsoft Corporation, through counsel undersigned, files this combined response and non-opposition to (a) Motorola's April 13, 2012 Motion to File Documents Under Seal in Support of its Opposition to Microsoft's Motion for Summary Judgment of

MICROSOFT'S COMBINED RESPONSE TO
MOTOROLA'S APRIL 13, 2012 AND APRIL 20,
2012 MOTIONS TO FILE DOCUMENTS UNDER
SEAL (ECF NOS. 271 AND 287) - 1

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1 Breach of Contract (“April 13th Motion to Seal”) (ECF No. 271), and (b) Motorola’s April
 2 20, 2012 Motion to File Documents Under Seal in Support of its Reply in Support of its
 3 Motion for Partial Summary Judgment (“April 20th Motion to Seal”) (ECF No. 287).

4 Microsoft files this Response to provide additional support for, and express its
 5 agreement with, Motorola’s filing of Exhibits 29-32, 48, 50, and 55 under seal. Microsoft
 6 does not oppose Motorola’s filing of the other exhibits referenced in its April 13th Motion
 7 to Seal (Exhibits 27, 34-39, and 52-53) and April 20th Motion to Seal (Exhibit 60) under
 8 seal. For the reasons set forth herein, Microsoft requests that the Court maintain these
 9 documents under seal.

10 II. FACTS AND AUTHORITY

11 A. The Protective Order and Applicable Court Rules Permit the Filing of 12 Confidential and Sensitive Business Information under Seal.

13 Pursuant to the Protective Order issued by the Court on July 11, 2011, the parties are
 14 required to file materials designated as Confidential Business Information under seal, with
 15 such documents to remain under seal upon Court approval. Protective Order Regarding the
 16 Disclosure and Use of Discovery Materials (ECF No. 72), ¶¶ 2(a), 8.¹

17 The Federal Rules of Civil Procedure also recognize that courts may permit parties to
 18 file “trade secrets or other confidential research, development, or commercial information”
 19 under seal. Rule 26(c)(1)(G) and (H). Pursuant to Local Rule CR 5(g)(2), the Court may seal
 20 a document filed in support of a dispositive motion upon a “compelling showing that the
 21 public’s right of access is outweighed by the interests of the public and the parties in protecting
 22 the court’s files from public review.” *Id.*; see also *Kakakama v. City and Cnty of Honolulu*,
 23 447 F.3d 1172, 1179 (9th Cir. 2006).

24 _____
 25 ¹ “Confidential Business Information” is defined in the parties’ Protective Order as “information which has not
 been made public and which concerns or relates to the trade secrets, processes, operations, style of work, or
 apparatus, or to the production, sales, shipments, purchases, transfers, identification of customers, inventories,
 amounts or source of any income, profits, losses, or expenditures.” *Id.*, ¶1.

1 In determining whether compelling reasons exist, the Court weighs relevant factors
 2 such as “the public interest in understanding the judicial process and whether disclosure of the
 3 material could result in improper use of the material for scandalous or libelous purposes or
 4 infringement upon trade secrets.” *Dish Network, L.L.C. v. Sonicview USA, Inc.*, 2009 U.S.
 5 Dist. LEXIS 73857, *2-3 (S.D. Cal. Aug. 20, 2009), *citing Pintos v. Pac. Creditors Ass’n*, 565
 6 F.3d 1106, 1116 n.6 (9th Cir. 2009). Where the material sought to be sealed “includes
 7 information about proprietary business operations, a company’s business model or agreements
 8 with clients, there are compelling reasons to seal the material because possible infringement of
 9 trade secrets outweighs the general public interest in understanding the judicial process.”
 10 *Selling Source, LLC v. Red River Ventures, LLC*, 2011 U.S. Dist. LEXIS 49664, *18 (D. Nev.
 11 Apr. 29, 2011).

12 Further, while the public generally enjoys a right to inspect and copy public records,
 13 “it is uncontested ... that the right to inspect and copy judicial records is not absolute.
 14 Every court has supervisory power over its own records and files, and access has been
 15 denied where court files might have become a vehicle for improper purposes.” *Nixon v.*
 16 *Warner Communications, Inc.*, 435 U.S. 589, 598, 98 S. Ct. 1306 (1978). As the Court
 17 recognized, one such “improper purpose” is where the commercial business information at
 18 issue is sought to be used as a “source[] of business information that might harm a litigant’s
 19 competitive standing.” *Id.* (denying access to copies of tapes played at trial and noting that
 20 courts refused public access to their files where granting such access might “become a
 21 vehicle for improper purposes,” including causing a litigant competitive harm).

22 **B. Compelling Reasons Exist to Seal Exhibits 29-32, 48, 50, and 55.**

23 1. *Exhibit 32 – The Deposition Transcript of Horacio Gutierrez.*

24 Exhibit 32 to the April 13, 2012 declaration of Kevin Post (ECF No. 273) consists of
 25 the entire 129-page transcript from the deposition of Horacio Gutierrez, Microsoft’s

1 Corporate Vice President and Deputy General Counsel in charge of its Intellectual Property
 2 Group. Exhibit 32 should remain under seal. It contains a significant amount of testimony
 3 concerning Microsoft's intellectual property and licensing programs and policies, and other
 4 confidential and sensitive information relating to Microsoft's business practices, including
 5 as it relates to the parties' confidential negotiations. As Motorola notes, disclosure of this
 6 information to third parties could lead to competitive harm to Microsoft. Microsoft's
 7 significant interest in maintaining the confidentiality of this proprietary and confidential
 8 business information outweighs any slight interest the public may have in the information.

9 Further, Microsoft has appended hereto as "Attachment A" a redacted version of Mr.
 10 Gutierrez's deposition, in which only those portions of the deposition that specifically
 11 contain Microsoft's confidential business information have been redacted. Filing of this
 12 redacted version will limit the amount of sealed information to the minimum necessary to
 13 protect Microsoft's non-public and commercially sensitive information. Motorola's motion
 14 to seal Exhibit 32 should be granted.

15 2. *Exhibits 29-30 – The Report and Testimony of Louis Berneman.*

16 Exhibits 29-30 likewise should remain sealed. Exhibit 29 contains portions of the
 17 expert report of Louis P. Berneman, which was submitted by Microsoft in another action
 18 pending between these same parties before the ITC – *In the Matter of Certain Mobile*
 19 *Devices, Associated Software, and Components Thereof*, ITC Inv. No. 337-TA-744 ("744
 20 ITC Action"). Exhibit 30 contains portions of Mr. Berneman's confidential deposition
 21 testimony in the 744 ITC Action. Both documents were designated as containing
 22 "Confidential Business Information" subject to the protective orders entered in the 744 ITC
 23 Action and in this Action. As Motorola states in its motion, both documents contain
 24 confidential information relating to the parties' licensing and confidential commercial
 25

1 dealings, the disclosure of which could lead to competitive harm to Microsoft and/or
2 Motorola. Exhibits 29 and 30 should remain sealed.

3 3. *Exhibits 31 and 55 – Email Thread and Attachment.*

4 Exhibit 55 to the April 20, 2012 declaration of Kevin Post (ECF No. 289) consists of
5 a series of emails sent by Microsoft to certain third parties with whom Microsoft shared a
6 common interest relating to various standards policy issues, along with an attachment to one
7 of the emails. Exhibit 31 and the last four pages of Exhibit 55 are the same.

8 These exhibits should be maintained under seal. Microsoft's reasonable and good
9 faith belief is, and consistently has been, that information shared between the parties
10 identified in Exhibit 55 would be treated and maintained as confidential. It is Microsoft's
11 belief that the other parties to the email likewise had a reasonable expectation that all
12 information shared between and among these parties in these discussions would be
13 maintained as confidential and not publicly disclosed. These policy discussions are not a
14 matter of public record, and the disclosure of the substance of these emails and the parties to
15 these communications has the possibility of negatively impacting Microsoft's relationship
16 with third parties, including the recipients of Exhibit 55. Disclosure of Exhibit 55 may also
17 negatively affect these third party participants' relationships with others.

18 Further, the attachment to the email (*i.e.* Exhibit 31 and the last four pages of Exhibit
19 55) consists of a draft document provided by a third party to Microsoft to forward to the
20 recipients of the email for discussion purposes. It is Microsoft's reasonable and good faith
21 belief that the third party who provided Microsoft with the attachment intended and
22 expected that it would be treated as confidential and that it would be disclosed only to the
23 recipients of the email to which it was attached. Disclosure of this document publicly could
24 negatively impact Microsoft's relationship with third parties, including the third party who
25 provided the document to Microsoft, and the recipients of the email, who believed that their

1 policy discussions with Microsoft would be treated as confidential. Microsoft's interest in
 2 maintaining the confidentiality of these exhibits significantly outweighs the general public
 3 interest in understanding the judicial process; Exhibits 31 and 55 should remain sealed.

4 3. *Exhibit 48 – Deposition Testimony of Albert Pennello.*

5 Exhibit 48 consists of excerpts from the deposition of Albert Pennello, a Microsoft
 6 product planner, in another ITC Action pending between these same parties – *In The Matter*
 7 *of Certain Gaming and Entertainment Consoles, Related Software, and Components*
 8 *Thereof*, Inv. No. 337-TA-752 (the “752 ITC Action”). This testimony was designated as
 9 confidential under the protective order in the 752 ITC Action and has been treated as such
 10 throughout the 752 ITC Action. It contains confidential and sensitive business information
 11 relating to Microsoft's Xbox 360 and its competitors. Motorola states in its motion, and
 12 Microsoft agrees, that disclosure of this information to third parties could have the potential
 13 to lead to competitive harm to Microsoft. Exhibit 48 should remain under seal.

14 4. *Exhibit 50 – FY11 Accessories Plan for US Xbox 360.*

15 Exhibit 50 is an internal Microsoft PowerPoint deck that discusses Microsoft's sales
 16 and strategies relating to Xbox 360 accessories for fiscal year 2011. This information is
 17 highly sensitive, contains Microsoft's confidential business information, and would likely
 18 lead to competitive harm if it were accessible to Microsoft's competitors. Any slight
 19 interest that the public may have in accessing this document is significantly outweighed by
 20 the potential for competitive harm such disclosure would have on Microsoft. It has been
 21 appropriately designated as “Confidential Business Information” under the terms of the
 22 protective order, and should remain under seal.

23 **C. Microsoft Does Not Oppose Motorola's Motion to Seal Exhibits 27, 34-39, 52,**
 24 **53, and 60.**

25 Microsoft does not oppose Motorola's April 13th Motion to the Seal with respect to
 Exhibits 27, 34-39, 52, 53, and 60. Nothing herein is intended as a waiver of Microsoft's

1 right to contest Motorola's designation of material as Confidential Business Information in
2 accordance with the terms of the Protective Order entered on July 21, 2011 [Docket No.
3 72]. Microsoft expressly reserves the right to do so as the circumstances warrant.

4 **III. CONCLUSION**

5 For the reasons set forth herein, Microsoft requests that the Court grant Motorola's
6 April 13, 2012 and April 20, 2012 Motions to Seal.

7 DATED this 2nd day of May, 2012.

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CERTIFICATE OF SERVICE

I hereby certify that on May 2, 2012, I electronically filed the foregoing document with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to the following:

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